

THE HONORABLE ROBERT S. LASNIK

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

ANIMAL LEGAL DEFENSE FUND,

Plaintiff,

v.

OLYMPIC GAME FARM, INC.,
ROBERT BEEBE, JAMES BEEBE, AND
KENNETH BEEBE,

Defendants.

No. 3:18-cv-06025-RSL

consolidated with
No. 3:22-cv-05774-RSL

**DEFENDANTS' SECOND MOTION
FOR SUMMARY JUDGMENT**

**NOTE ON MOTION CALENDAR:
December 29, 2023**

DEFENDANTS' SECOND MOTION FOR
SUMMARY JUDGMENT (3:18-cv-06025-RSL)

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I. INTRODUCTION AND RELIEF REQUESTED

Plaintiff, Animal Legal Defense Fund (“ALDF”), brought public nuisance claims (now dismissed) and Endangered Species Act (“ESA”) claims (now mostly dismissed) against Defendants, Olympic Game Farm, Robert Beebe, James Beebe, and Kenneth Beebe (collectively, “OGF”), because ALDF does not believe that zoos should exist. ALDF represents people who also do not like zoos, yet still visit zoos where they see things that, predictably, they do not like.

This original lawsuit (“*ALDF I*”) has been pending for five years, during which two geriatric brown bears (Good Mama and Samantha) living in the same enclosure unfortunately suffered injuries from cheatgrass, a pervasive weed that is a common bane to pet owners in the Pacific Northwest and the nation.¹ Both bears were immediately treated for the injuries under the direction of OGF’s veterinarian.² Both bears are now deceased, and there is no evidence that their deaths were caused by cheatgrass.³ Nor has any other brown bear suffered cheatgrass-related injuries since then.

ALDF learned about Samantha and Good Mama’s injuries through discovery.⁴ No ALDF member or expert saw these injuries, witnessed the medical treatment provided, or saw the bears after their injuries.⁵ In fact, it is not clear that any ALDF member *ever* saw these two bears. Nonetheless, years after both bears died, ALDF filed a new lawsuit (“*ALDF II*”) alleging that OGF is violating the ESA because of cheatgrass, and that other brown bears are at risk of suffering cheatgrass-related injuries.⁶

¹ See Declaration of Robert Beebe (“**Beebe Decl.**”) ¶¶ 15.

² *Id.* at ¶¶ 25-30.

³ *Id.* at ¶¶ 28, 38 & Exs. J-K.

⁴ Dkt. 279 at ¶¶ 19, 22.

⁵ See *id.*

⁶ *Animal Legal Defense Fund v. Olympic Game Farm*, No. 3:22-cv-05774.

1 Defendants are entitled to summary judgment on ALDF's cheatgrass claims for the
2 following three reasons.

3 *First*, ALDF lacks Article III standing to maintain these cheatgrass claims. Although
4 ALDF managed to artfully plead its complaint to avoid dismissal under Rule 12(b)(6), depositions
5 of ALDF members Carol McGee, Scott McGee, and Carolyn Long confirm that they only learned
6 of the cheatgrass-related issues second hand through ALDF's selective production of documents
7 provided long *after* they visited OGF, and long *after* they decided that they were never returning
8 to OGF for other reasons. These members continue to condition their return to OGF on complete
9 resolution of *all* their non-cheatgrass-related concerns. ALDF's alleged injuries are self-inflicted
10 and its members' alleged plans to return to OGF are illusory.

11 *Second*, ALDF's claim fails to meet statutory jurisdictional requirements. An ESA citizen-
12 suit is limited to injunctive relief against "ongoing" violations. Samantha and Good Mama's
13 injuries were unfortunate, but discrete events, and even if those injuries were ESA violations, they
14 were wholly in the past at the time *ALDF II* was filed. There is no evidence of continuing or
15 ongoing cheatgrass-related injuries.

16 *Third*, ALDF's ESA claims fail on the facts. ALDF's burden is to come forward with
17 evidence showing that an injunction is needed to prevent imminent injury or death to grizzly bears
18 caused by cheatgrass. ALDF cannot meet this burden. There are only five alleged grizzly bears
19 living at OGF, and those five bears have lived at OGF for their entire lives *without suffering any*
20 *cheatgrass injuries*. That is so because OGF engages in regular cheatgrass control practices that
21 minimize the risk of injury. ALDF has no evidence that these practices are inadequate and
22 identifies no other reasonable cheatgrass control measures that OGF should be implementing, and
23 tellingly, identifies no such measures in either its 60-day notice or its Amended Complaint.

24 For these reasons, ALDF's cheatgrass-related claims should be dismissed.
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26

II. STATEMENT OF FACTS

A. Cheatgrass Is an Invasive Weed That Is Difficult to Control.

Cheatgrass is an invasive annual grass found across the Pacific Northwest.⁷ Cheatgrass is not inherently dangerous to domestic and wild animals, especially in its juvenile green stage when it is commonly consumed by hoofstock and other animals.⁸ Instead, cheatgrass can pose as a danger after it produces grass awns that dry out during the summer.⁹ Grass awns can get caught in fur, and if it is not removed through grooming or other means, the awn may migrate and penetrate the skin, injuring the animal and potentially leading to an infection.¹⁰

No one can credibly dispute that cheatgrass is everywhere in the West. It is endemic, and impossible to eradicate.¹¹ It can even be found in Sequim Animal Hospital's lawn and on ALDF expert Dr. Lisa Harrenstien's property.¹² Because of its pervasiveness, pets commonly experience cheatgrass injuries while outdoors.¹³ Indeed, ALDF member Carol McGee admits that her dog was injured by cheatgrass *twice*, once requiring surgery.¹⁴ Apparently, even humans are not immune as ALDF member Carolyn Long testified her relative "almost died" from a cheatgrass injury.¹⁵

⁷ Beebe Decl. ¶ 15.

⁸ *Id.*

⁹ *Id.*

¹⁰ *Id.*

¹¹ *Id.*

¹² Declaration of Jason Morgan ("**Morgan Decl.**"), Exs. A (Deposition of Dr. Heather Short ("**Short Dep.**") 96:5-10) & B (Deposition of Dr. Lisa Harrenstien ("**Harrenstien Dep.**") 39:24-40:9).

¹³ Morgan Decl., Ex. A (Short Dep. 96:14-20).

¹⁴ *Id.*, Ex. C (Deposition of Carol McGee ("**C. McGee Dep.**") 21:25-23:12).

¹⁵ *Id.*, Ex. D (Deposition of Carolyn Long ("**Long Dep.**") 55:24-56:7).

B. OGF Manages and Controls Cheatgrass.

In OGF's 50-plus year history, it has experienced less than a handful of instances where an animal suffered injuries from cheatgrass awns.¹⁶ That is because OGF actively manages and controls cheatgrass through multiple measures, including pulling cheatgrass down to its roots, mowing and trimming to prevent grass awns from developing and drying out, planting native plants to choke out cheatgrass, selective use of herbicides, and when necessary, tilling (or excavation) of fields.¹⁷

OGF has never received a citation from the USDA regarding cheatgrass in its animal enclosures and its property, or for cheatgrass-related injuries and related veterinary care.¹⁸ OGF knows that it is impossible to eradicate the weed and, therefore, continuously monitors animal enclosures for signs of cheatgrass growth.¹⁹ OGF regularly investigates new methods of eradicating cheatgrass that other farmers and similar facilities utilize to incorporate into its current animal husbandry practices.²⁰ This includes testing non-toxic solutions, such as white vinegar, and other chemical herbicides, such as WeedMaster and Killz All, around the bear enclosures' hotlines, other fence lines, and public walkways and pathways.²¹ None of these solutions have successfully eradicated cheatgrass, but they have helped mitigate cheatgrass growth.²²

C. Brown Bears at OGF.

There are approximately 350 animals currently living at OGF.²³ Since 2018, there have been 15 brown bears and three black bears who have lived at OGF, with many more brown bears

¹⁶ Beebe Decl. ¶ 24; *see also* Morgan Decl., Ex. E (Deposition of Clayton Richmond ("Richmond Dep.") 182:4-13).

¹⁷ Beebe Decl. ¶¶ 17-22.

¹⁸ *Id.* at ¶¶ 8-14 & Exs. C-H.

¹⁹ *Id.* at ¶¶ 15-17.

²⁰ *Id.* at ¶¶ 21.

²¹ *Id.* at ¶ 21.

²² *Id.*

²³ *Id.* at ¶ 4.

during the last 50-plus years of operation.²⁴ Of those bears, only six are alleged grizzly bears (including one geriatric bear who recently died) who may be subject to protection under the ESA: Donald, Moxie, Lilly (or Lillie), Fee, Fie, and Fumm.²⁵ Donald and Moxie were born in Canada in captivity and were transferred to OGF in June 2016 when they were six months old.²⁶ Lilly was born at OGF in 1991, and Fee, Fie, and Fumm were born at OGF in 1998.²⁷ As of December 2023, Donald and Moxie are approximately seven years old, Lilly is approximately 32 years old, and Fee and Fie are approximately 25 years old.²⁸ Fumm recently passed away of old age at 25 years old.²⁹ None of these bears have experienced a cheatgrass injury while living at OGF.³⁰

Good Mama and Samantha are two brown bears who were born at OGF in January 1991.³¹ These two geriatric bears lived in the same enclosure and experienced cheatgrass-related injuries in August and September 2019.³² Both bears received prompt medical attention from Sequim Animal Hospital for their injuries.³³ For the bear Samantha, treatment of cheatgrass injuries included temporary confinement in a mobile bear trailer, at the direction of the attending veterinarian.³⁴ OGF proceeded to remediate the bear field by removing a foot of topsoil and reseeding the entire enclosure.³⁵ Good Mama passed away on September 20, 2019.³⁶ Samantha

²⁴ *Id.*

²⁵ ALDF has stipulated that Miska, Yuri, Tug, and Bella are not protected by the ESA.

²⁶ Beebe Decl. ¶ 4.

²⁷ *Id.*

²⁸ *Id.*

²⁹ *Id.*

³⁰ *Id.*

³¹ *Id.* at ¶¶ 25, 29.

³² *Id.* at ¶ 24.

³³ *Id.* at ¶ 25, 29.

³⁴ *Id.* at ¶ 34.

³⁵ *Id.* at ¶ 31.

³⁶ *Id.* at ¶ 28.

1 passed away in March of 2021.³⁷ Neither necropsy report showed that their deaths were directly
 2 caused by their cheatgrass-related injuries.³⁸

3 Since 2019, no brown bear has experienced a cheatgrass-related injury at OGF.³⁹ And to
 4 OGF's knowledge, Samantha and Good Mama were the only brown bears at OGF to have ever
 5 suffered a cheatgrass-related injury.⁴⁰

6 **D. Procedural Background.**

7 In 2018, ALDF filed suit against OGF, asserting jurisdiction under the citizen-suit
 8 provision of the ESA.⁴¹ For the first time at summary judgment in March 2021, ALDF asserted
 9 that the bear enclosures contained cheatgrass and that the use of a bear trailer to treat bears who
 10 were healing from a cheatgrass injury amounted to a take under the ESA.⁴²

11 In March 2022, this Court denied ALDF's summary judgment motion in its entirety and
 12 granted in part OGF's summary judgment motion.⁴³ The Court dismissed a number of ALDF's
 13 claims (including the cheatgrass-related claims), primarily on two grounds: (1) ALDF failed to
 14 identify a relevant generally accepted animal husbandry standard, or (2) the Court lacked
 15 jurisdiction over claims that were not included in ALDF's 60-day notice letter. In so holding, the
 16 Court rejected ALDF's reliance on the Association of Zoos and Aquariums ("AZA") accreditation
 17 standards, concluding that "the AZA is an elite, voluntary, zoological association" and that
 18 aspirational AZA standards do not reflect generally accepted animal husbandry practices.⁴⁴

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21 ³⁷ *Id.* at ¶ 38.

22 ³⁸ *Id.* at ¶ 28, 38 & Exs. J-K; Morgan Decl., Exs. F (Deposition of Dr. Laura Williams 16:3-19, 29:3-11, 30:10-16) & G (Deposition of Dr. Jeffrey Abbott 20:12-23, 23:10-24:4, 30:19-31:25).

23 ³⁹ Beebe Decl. ¶ 24.

24 ⁴⁰ *Id.*

25 ⁴¹ *Animal Legal Defense Fund v. Olympic Game Farm*, No. 3:18-cv-06025 (ALDF I).

26 ⁴² Dkt. 147 at 18-22.

⁴³ Dkts. 228, 229.

⁴⁴ Dkt. 228 at 21.

ALDF subsequently sought leave to amend its complaint to include the same cheatgrass claim, which was denied in September 2022.⁴⁵ In October 2022, ALDF filed a second lawsuit, *ALDF II*, premised on the same cheatgrass claim already raised and dismissed on summary judgment in *ALDF I*.⁴⁶ ALDF alleged that OGF was violating the ESA by harassing and harming brown bears by keeping them “in enclosures rife with cheatgrass” and by providing the bears with inadequate veterinary care for cheatgrass-related injuries.⁴⁷ The Court dismissed ALDF’s complaint for lack of standing.⁴⁸ ALDF then amended its complaint and asserted it had organizational standing based on three ALDF members (Carol and Scott McGee and Carolyn Long) who learned about Good Mama and Samantha’s 2019 cheatgrass injuries and related veterinary care purely “[t]hrough ALDF’s discovery in this lawsuit, pre-consolidation.”⁴⁹ The McGees have not been to OGF since 2014, and Ms. Long had not been to OGF since 2017.⁵⁰ No ALDF member has personally seen the bear trailer either.⁵¹

E. ESA Legal Framework.

The ESA citizen-suit provision provides for a cause of action to enjoin ongoing violations of the ESA or its implementing regulations or to prevent imminent future violations that are reasonably certain to occur.⁵² As a forward-looking statute, the ESA does not authorize courts to issue injunctive relief for “wholly past violations.”⁵³ Further, the citizen-suit provision is strictly

⁴⁵ Dkts. 234, 255.

⁴⁶ *ALDF II*, Dkt. 1.

⁴⁷ *Id.* at ¶¶ 1, 37.

⁴⁸ *ALDF II*, Dkt. 20 at 8.

⁴⁹ *ALDF II*, Dkt. 21 at ¶¶ 5, 8.

⁵⁰ Morgan Decl., Exs. C (C. McGee Dep. 64:12-16), D (Long Dep. at 50:19-22), & H (Declaration of Scott McGee (“**S. McGee Dep.**”) 44:2-23).

⁵¹ *See* Dkt. 279 at ¶ 22.

⁵² 16 U.S.C. § 1540; *Hoopa Valley Tribe v. Nat’l Marine Fisheries Serv.*, 230 F. Supp. 3d 1106, 1120 (N.D. Cal. 2017), *order clarified*, No. 16-CV-04294-WHO, 2018 WL 2010980 (N.D. Cal. Apr. 30, 2018).

⁵³ *Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Found., Inc.*, 484 U.S. 49, 63-64 (1987) (interpreting identical language in the Clean Water Act’s citizen-suit provision).

1 limited to prospective injunctive relief and does not allow for an award of damages or civil
 2 penalties.⁵⁴ Any injunctive relief granted must be “precisely tailored to remedy the precise [ESA]
 3 violation.”⁵⁵

4 Under the ESA, it is unlawful to “take” any species listed as endangered or threatened if
 5 provided by special regulation.⁵⁶ The term “take” is defined as “harass, harm, pursue, hunt, shoot,
 6 wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct.”⁵⁷ The terms
 7 “harass” and “harm” are relevant here and have “a different character when applied to an animal
 8 in captivity than when applied to [an] animal in the wild.”⁵⁸

9 **1. Harass**

10 The term “harass” includes “an intentional or negligent act or omission which creates the
 11 *likelihood of injury* to wildlife by annoying it to such an extent as to significantly disrupt normal
 12 behavioral patterns which include, but are not limited to, breeding, feeding, or sheltering.”⁵⁹ That
 13 definition, however, is limited for captive wildlife:

14 [W]hen applied to captive wildlife, [“harassment”] does not include generally
 15 accepted:

16 (1) Animal husbandry practices that meet or exceed the minimum standards
 for facilities and care under the Animal Welfare Act,

17 (2) Breeding procedures, or

21 ⁵⁴ *Cascadia Wildlands v. Scott Timber Co.*, 328 F. Supp. 3d 1119, 1131-32 (D. Or. 2018); *Ctr. for Env’t Sci.*
v. Cowin, No. 1:15-CV-01852-LJO-BAM, 2016 WL 3196774, at *3 (E.D. Cal. June 8, 2016).

22 ⁵⁵ *Animal Prot. Inst., Ctr. for Biological Diversity v. Holsten*, 541 F. Supp. 2d 1073, 1080 (D. Minn. 2008);
 23 *see also Strahan v. Cox*, 127 F.3d 155, 171 (1st Cir. 1997) (denying request for permanent injunctive relief because
 “probable violation of the ESA could be curtailed without such extreme measures”).

24 ⁵⁶ 16 U.S.C. § 1538(a)(1)(B).

25 ⁵⁷ *Id.* at § 1532(19).

26 ⁵⁸ *People for the Ethical Treatment of Animals, Inc. v. Miami Seaquarium*, 189 F. Supp. 3d 1327, 1349-50
 (S.D. Fla. 2016), *aff’d*, 879 F.3d 1142 (11th Cir. 2018), *adhered to on denial of reh’g*, 905 F.3d 1307 (11th Cir. 2018).

⁵⁹ 50 C.F.R. § 17.3 (emphasis added).

(3) Provisions of veterinary care for confining, tranquilizing, or anesthetizing, when such practices, procedures, or provisions are not likely to result in injury to the wildlife.^{60]}

“[M]easures necessary for the proper care and maintenance of listed wildlife in captivity do not constitute ‘harassment’ or ‘taking’.”⁶¹ To establish harassment under the ESA, a plaintiff bears the burden to prove “(1) that the [defendant’s] animal husbandry practices fall within 50 C.F.R. § 17.3’s definition of harass, *and* (2) that those practices do not fall within the first enumerated exclusion from that definition.”⁶²

The ESA does not establish standards for animal care of listed species in captivity.⁶³ “Congress elected not to prescribe captive care requirements in the ESA, or expand the definition of ‘take’ to include the humane treatment of endangered species in captivity.”⁶⁴ Instead, those standards are issued by the USDA pursuant to the Animal Welfare Act (“AWA”) and enforced by Animal and Plant Health Inspection Service (“APHIS”), an agency within the USDA.⁶⁵ Other than the AWA, “[t]here is no set of regulations or other guidance promulgated by the FWS or USDA delineating what ‘generally accepted’ animal husbandry practices are with respect to any endangered or threatened species”⁶⁶

⁶⁰ *Id.*

⁶¹ *Captive-bred Wildlife Regulation*, 63 Fed. Reg. 48634, 48636 (Sept. 11, 1998) (“The purpose of amending the [FWS] definition of ‘harass’ is to exclude proper animal husbandry practices that are not likely to result in injury from the prohibition against ‘take’. Since captive animals can be subjected to improper husbandry as well as to harm and other taking activities, the [FWS] considers it prudent to maintain such protections, consistent with Congressional intent.”).

⁶² *Hill v. Coggins*, 867 F.3d 499, 510 (4th Cir. 2017) (emphasis added).

⁶³ *Miami Seaquarium*, 189 F. Supp. 3d at 1354.

⁶⁴ *Id.*

⁶⁵ *Id.* (“[Congress] left such responsibility with the Secretary of Agriculture under the authority granted by the AWA and his delegee, APHIS.”); *Mo. Primate Found. v. People for Ethical Treatment of Animals, Inc.*, No. 4:16 CV 2163 CDP, 2018 WL 1420239, at *2 (E.D. Mo. Mar. 22, 2018).

⁶⁶ *Hill v. Coggins*, 423 F. Supp. 3d 209, 219 (W.D.N.C. 2019).

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traceable to cheatgrass in the brown bear enclosures and redressable by a favorable decision.⁷³ But depositions of ALDF's members and an additional round of discovery has confirmed that ALDF relies on "self-inflicted" harm to manufacture standing for cheatgrass-related claims and that no ALDF member has any present intent to return to OGF.⁷⁴

1. Organizational Standing Legal Principles

An organization only has standing to assert a legal claim on behalf of its members when "(a) its members would otherwise have standing to sue in their own right; (b) the interests it seeks to protect are germane to the organization's purposes; and (c) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit."⁷⁵

[T]o satisfy Article III's standing requirements, a plaintiff must show (1) it has suffered an "injury in fact" that is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical; (2) the injury is fairly traceable to the challenged action of the defendant; and (3) it is likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision.^[76]

Article III standing is not "commutative" and "a plaintiff must demonstrate standing for each claim he seeks to press."⁷⁷ "[A] plaintiff who has been subject to injurious conduct of one kind [does not] possess by virtue of that injury the necessary stake in litigating conduct of another kind, although similar, to which he has not been subject."⁷⁸

⁷³ *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560-61 (1992) (quoting Fed. R. Civ. P. 56(e)).

⁷⁴ *See Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 418 (2013).

⁷⁵ *Hunt v. Wash. State Apple Advert. Comm'n*, 432 U.S. 333, 343 (1977).

⁷⁶ *Friends of the Earth, Inc. v. Laidlaw Env't Servs. (TOC), Inc.*, 528 U.S. 167, 180-81 (2000) (citing *Lujan*, 504 U.S. at 560-61).

⁷⁷ *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 335 (2006).

⁷⁸ *Blum v. Yaretsky*, 457 U.S. 991, 999 (1982); *see also Lewis v. Casey*, 518 U.S. 343, 358 n.6 (1996) ("If the right to complain of one administrative deficiency automatically conferred the right to complain of all administrative deficiencies, any citizen aggrieved in one respect could bring the whole structure of state administration before the courts for review.").

2. **ALDF Members Did Not Suffer Recreational or Aesthetic Injuries Related to Brown Bears and Cheatgrass While at OGF.**

ALDF's original lawsuit (*ALDF I*) was based on a mistaken visit in 2014 by Carol and Scott McGee, who left upset after seeing brown bears eat bread.⁷⁹ Ms. Long also visited the brown bears several times (with the last time in 2015) and professed to be disturbed by bears eating bread, although she oddly admitted that she, her husband, and her grandson fed bread to the bears.⁸⁰

None of the declarants have any meaningful connection to any of the bears at OGF, let alone the brown bears at issue here. The McGees saw two or three bears once in 2014 and spent a grand total of less than five minutes observing those bears, which Ms. McGee admits looked "physically, fine."⁸¹ Ms. Long saw a handful of bears a few more times, spending no more than five minutes each time while driving through the bear fields.⁸² The last time Ms. Long saw a brown bear at OGF was in 2015 and she "did not see any injuries" to the bears.⁸³ She visited OGF in 2017 to gather information for *ALDF I*, but she did not bother to check in on the brown bears.⁸⁴ Neither the McGees nor Ms. Long know which bears they saw during their brief visits, whether those bears are still alive, or whether the bears they saw were, indeed, grizzlies.⁸⁵ Regardless, all three readily admit that that they refuse to return to OGF until *all* of their identified concerns from *ALDF I* are resolved.⁸⁶

⁷⁹ Dkt. 151 at ¶¶ 8-9, 12; Dkt. 152 at ¶¶ 5-6, 8.

⁸⁰ Dkt. 153 at ¶¶ 5, 16; Morgan Decl., Ex. D (Long Dep. 37:8-38:5, 38:14-39:6, 46:18-21, 59:20-60:6).

⁸¹ Morgan Decl., Ex. C (C. McGee Dep. 42:6-10).

⁸² *Id.*, Ex. D (Long Dep. 26:19-21, 31:18-20, 42:25-43:2).

⁸³ *Id.*, Ex. D (Long Dep. 44:4-5, 59:20-60:6).

⁸⁴ *Id.*, Ex. D (Long Dep. 46:9-21, 59:20-60:6).

⁸⁵ With no actual knowledge about which bears they have briefly seen, the McGees and Ms. Long "cannot in the circumstances of this case have been injured" by their observations at OGF. *Citizens to End Animal Suffering & Exploitation, Inc. v. New England Aquarium*, 836 F. Supp. 45, 52 & n.4 (D. Mass. 1993).

⁸⁶ Morgan Decl., Exs. C (C. McGee Dep. 37:10-22, 63:11-22, 77:15-80:16), H (S. McGee Dep. 43:2-8, 48:22-49:11), & D (Long Dep. 53:23-54:2, 57:3-14).

Over the course of this five-year litigation, ALDF stumbled upon a new legal theory related to Good Mama and Samantha’s 2019 cheatgrass injuries disclosed in discovery. But ALDF could not find a member who had actually observed and were injured by cheatgrass or any cheatgrass-related injuries. As a result, ALDF attempted to cause injury to its own members by providing the McGees and Ms. Long with a selective set of court-filed documents discussing cheatgrass issues at OGF.⁸⁷ Again, neither the McGees nor Ms. Long have seen a brown bear at OGF since 2014 and 2015. Further, it is undisputed that the McGees and Ms. Long only “became aware” of Good Mama and Samantha’s 2019 cheatgrass-related injuries “through ALDF’s discovery” and that they did not have any concerns related to cheatgrass during their past visits *until* ALDF fed them information contained in court-filed documents.⁸⁸ But a “self-inflicted injur[y]” does not create standing.⁸⁹ “In other words, [ALDF] cannot manufacture standing merely by inflicting harm on themselves based on their fears of hypothetical future harm that is not certainly impending.”⁹⁰

Ms. Long stated in her deposition that she was not made aware of the cheatgrass-related issues until she “saw the first amended complaint” in *ALDF II* or in the alternative, through court filings or other unidentified documents provided by ALDF.⁹¹ Ms. Long explained that she “learned about the cheatgrass [issues]” from four legal documents: “[her] declaration, the declaration from Dr. Lisa Harrenstien, the first amended complaint, and the ... request for ... partial summary judgment.”⁹² She was not provided with any other legal documents, such as Dr. Michael Briggs’ expert report or Robert Beebe’s declarations, and stated that she “assume[d]” all the information ALDF gave her was complete and accurate because “it’s a legal document” and

⁸⁷ *Id.*, Exs. C (C. McGee Dep. 65:10-66:1), H (S. McGee Dep. 33:1-12, 44:25-45:11), & D (Long Dep. 9:15-24, 57:16-59:2).

⁸⁸ Dkt. 279 at ¶¶ 19, 22.

⁸⁹ *Clapper*, 568 U.S. at 418.

⁹⁰ *Id.* at 416.

⁹¹ Morgan Decl., Ex. D (Long Dep. 57:3-59:8).

⁹² *Id.*, Ex. D (Long Dep. 9:15-10:4; 56:3-59:8). It is unclear which amended complaint Ms. Long has read.

1 therefore “all legal and true.”⁹³ And despite her alleged distress, Ms. Long could not provide any
 2 additional details about how she learned about the cheatgrass issues, such as when ALDF provided
 3 her with the legal documents or what conversations she had with ALDF that may have triggered
 4 her emotionally. And to ensure continued opacity, ALDF has asserted attorney-client privilege
 5 over the very communications that form the basis for these injuries.⁹⁴

6 Ms. Long was equally clear that her emotional connection with the brown bears was based
 7 on information she read in documents:

8 Q. Do you believe you have an emotional connection to the bears at
 9 Olympic Game Farm?

10 A. Yes.

11 Q. What is the basis for that connection?

12 A. Having read all the documents about their problems, their lack of
 13 vet care, their injuries, lack of treatment, and medications not given,
 having learned that, I have an emotional connection to them.^[95]

14 The aesthetic interest and distress that Ms. Long alleges is nothing more than a general grievance
 15 that any “concerned bystander[]” has while reading the news about a topic that he or she cares
 16 about written by someone with an agenda to push forward.⁹⁶

17 Similarly, the McGees each testified that their knowledge of cheatgrass-related injuries and
 18 their emotional connection to the brown bears here are based on documents that ALDF provided
 19 to them—the specific timing and details of which ALDF has withheld as privileged.⁹⁷ But in her
 20 deposition, Ms. McGee testified that her knowledge of, and emotional connection to, the bears is
 21 based on information supplied by ALDF years after-the-fact:

22 Q. And what have you heard about Samantha?

23 ⁹³ *Id.*, Ex. D (Long Dep. 59:4-18).

24 ⁹⁴ *Id.*, Ex. I.

25 ⁹⁵ *Id.*, Ex. D (Long Dep. 60:19-61:1).

26 ⁹⁶ *Hollingsworth v. Perry*, 570 U.S. 693, 707 (2013).

⁹⁷ Morgan Decl., Ex. I.

1 A. Through the documents I've read ... I think she's one of the bears
2 that have passed away, but I'm not sure if that was the one that
3 passed away from cheatgrass or some other form of -- some other
health issues.

4 Q. So your -- is it fair to say that your knowledge of Samantha comes
5 only comes from documents provided to you?

6 A. Yes.

7 Q. And when were those documents provided?

8 A. That was in the motion. *Sometime either end of 2022 or sometime
9 in the beginning of 2023*, around there.

10 ...

11 Q. So if I understand correctly, your emotional connection is based
12 solely on documents that you've read?

13 ...

14 THE WITNESS: So the two bears that I saw in 2014, I have an
emotional connection. Do I know their names? No. The bears that
I've read on the documents, do I have an emotional connection?
Yes. Have I seen them? I don't know which one I have seen and
have not seen in 2014.^[98]

15 Scott McGee similarly testified that he learned about cheatgrass from "ALDF documentation" and
16 that he has an emotional connection to the brown bears "[b]ecause they're animals in captivity,
17 suffering. So basic human empathy."⁹⁹ If all it takes to establish an aesthetic injury-in-fact is to
18 feed witnesses with select pleadings describing defendant's conduct in a vacuum, then
19 organizations have free rein to shop for individuals who have visited an area at some point and
20 manipulate them into feeling distressed about carefully curated information. But the Supreme
21 Court has instructed that parties "cannot manufacture standing merely by inflicting harm on
22 themselves based on their fears of hypothetical future harm that is not certainly impending."¹⁰⁰

23
24
25 ⁹⁸ *Id.*, Ex. C (C. McGee Dep. 65:10-66:1, 67:2-11) (emphasis added).

26 ⁹⁹ *Id.*, Ex. H (S. McGee Dep. 44:1-46:8).

¹⁰⁰ *Clapper*, 568 U.S. at 416.

ALDF's theory of establishing injury-in-fact is especially problematic because it allows a plaintiff to bootstrap an additional claim onto a preexisting aesthetic harm, which is contrary to the principles that standing must be established for *each claim presented*, namely a "concrete and particularized" injury that is "fairly ... trace[able]" to the challenged conduct underlying each claim and "not ... th[e] result [of] the independent action of some third party not before the court."¹⁰¹ Establishing injury-in-fact based on cherry-picked legal documents is especially egregious when the attorneys hide the actual communications and disclosures from discovery on privilege grounds.

3. ALDF Members Decided Long Ago to Never Return to OGF Based on the Living Conditions Observed During Their Visits.

Even if the McGee's and Ms. Long's aesthetic injuries could be traced to cheatgrass in the bear enclosures, their injuries are speculative given their firm decisions to never return to OGF for other reasons—namely, the conditions of animal enclosures as they existed during their past visits. None of those conditions that caused distress involved cheatgrass. Because many of their concerns have already been dismissed from this lawsuit, there is no actual and imminent injury.

During her deposition, Ms. Long explained that her visits to OGF made her sad because of the conditions of the bear enclosures at the time of her visits.¹⁰² This is consistent with her 2021 declaration, in which she explained that she "intentionally ha[s] not visited [OGF] since 2017 because it is so depressing" due to the lack of "enrichment for the animals," the "barren and dilapidated" nature of the animal enclosures, and animals begging for bread.¹⁰³ Moreover, she admitted that there must be more improvements made to OGF besides just having the "cheatgrass ... dealt with" for her to return, including legal claims that are no longer in this case.¹⁰⁴ By

¹⁰¹ *Lujan*, 504 U.S. at 560-61 (alterations in original) (citation omitted).

¹⁰² Morgan Decl., Ex. D (Long Dep. 34:8-20, 40:5-41:3, 42:8-16, 44:19-45:1, 46:22-47:12).

¹⁰³ Dkt. 153 at ¶¶ 6, 11-12, 16, 19.

¹⁰⁴ Morgan Decl., Ex. D (Long Dep. 51:4-9, 52:3-54:2).

1 conditioning her return to OGF on changes that fall outside the scope of this lawsuit, ALDF cannot
2 show that Ms. Long has an “actual or imminent” injury.¹⁰⁵

3 During their depositions, the McGees explained that they believe OGF engages in “animal
4 slavery”¹⁰⁶ and will not return to OGF unless all their concerns about the animal enclosure
5 conditions observed during their 2014 visit are addressed.¹⁰⁷ Consistent with her 2021 declaration
6 explaining that she “left [OGF] traumatized over the conditions of the animals,” Ms. McGee
7 identified multiple issues at OGF that must be resolved to warrant another visit.¹⁰⁸ Mr. McGee
8 expressed the same concerns and stated that they did not want to pay an admission fee when they
9 were near OGF in 2017 and 2018 because “the sight of the animals four years back still weighed
10 heavy on us.”¹⁰⁹ Because their “all or nothing” remedy approach includes legal claims that already
11 have been dismissed, there is no possibility that the McGees will return to OGF, let alone see for
12 their own eyes any cheatgrass in the bear enclosures for the first time. As a result, ALDF cannot
13 meet its burden to establish standing for its cheatgrass claim, warranting dismissal on summary
14 judgment.

15 **B. ALDF’s Cheatgrass Claim Is Not Actionable Under the ESA and Should Be**
16 **Dismissed for Lack of Jurisdiction.**

17 Standing is not the only jurisdictional flaw with ALDF’s cheatgrass claims. Even if ALDF
18 could prove that Good Mama’s and Samantha’s 2019 cheatgrass-related injuries and use of the
19 bear trailer were actual violations of the ESA (which they are not), there is no evidence in the
20 record that shows an *ongoing* violation that needs to be or can be remedied. Injuries to two brown

21 _____
22 ¹⁰⁵ See *Lujan*, 504 U.S. at 560, 564 (“Such ‘some day’ intentions—without any description of concrete plans,
or indeed even any specification of when the some day will be—do not support a finding of the ‘actual or imminent’
injury that our cases require.”).

23 ¹⁰⁶ The McGees define “animal slavery” as “using animals ... in ways that if they had a ... choice in the
24 matter, they would ... probably object” and “if humans were used that way, we could consider it enslavement.”
Morgan Decl., Ex. H (S. McGee Dep. 18:20-19:19); see also *id.*, Ex. C (C. McGee Dep. 19:1-20:7).

25 ¹⁰⁷ Morgan Decl., Exs. H (S. McGee Dep. 47:17-49:1) & C (C. McGee Dep. 63:11-14, 77:15-80:14).

26 ¹⁰⁸ Dkt. 151 at ¶¶ 9-14; Morgan Decl., Ex. C (C. McGee Dep. 77:15-78:16, 79:18-80:14).

¹⁰⁹ Dkt. 152 at ¶¶ 6-12, 15-17, 19; Morgan Decl., Ex. H (S. McGee Dep. 48:11-49:2).

bears who shared the same enclosure over four years ago are isolated events in the span of 50 years of practice, and were remedied years before the complaint in *ALDF II* was filed.¹¹⁰ Because ALDF relies entirely on “wholly past injuries,” this Court lacks subject matter jurisdiction over ALDF’s cheatgrass claim.¹¹¹

Congress designed the ESA citizen-suit provision to address harms that exist “in the present or the future, not in the past.”¹¹² To obtain injunctive relief, a plaintiff “must prove that there is a reasonable likelihood of future violations of the ESA.”¹¹³ There must be “a real and immediate threat of future or continuing injury *apart from any past injury*.”¹¹⁴ “Past exposure to illegal conduct does not in itself show a present case or controversy regarding injunctive relief ... if unaccompanied by any continuing, present adverse effects.”¹¹⁵

Here, Donald, Moxie, Lilly, Fee, and Fie are the only alleged grizzly bears that could be subject to protection under the ESA.¹¹⁶ None of those bears have ever sustained a cheatgrass-related injury while living at OGF.¹¹⁷ Samantha herself never experienced another cheatgrass-related injury after 2019, and died peacefully of old age in 2021. Dr. Harrenstien even admitted in her deposition that she has never seen any brown bears with cheatgrass-related injuries during any of her visits to OGF in 2018, 2020, and 2023.¹¹⁸

¹¹⁰ See *Gwaltney*, 484 U.S. 49, 59; *Nat’l Wildlife Fed’n v. Burlington N. R.R.*, 23 F.3d 1508, 1512 (9th Cir. 1994) (evidence of past takings standing alone cannot establish sufficient likelihood of a future injury).

¹¹¹ *Gwaltney*, 484 U.S. at 59-60.

¹¹² *Id.* at 59.

¹¹³ *Nat’l Wildlife Fed’n*, 23 F.3d at 1511.

¹¹⁴ *Aransas Project v. Shaw*, 775 F.3d 641, 648 (5th Cir. 2014) (emphasis added).

¹¹⁵ *Lujan*, 504 U.S. at 564 (quoting *City of Los Angeles v. Lyons*, 461 U.S. 95, 102 (1983)); see also *Aransas Project*, 775 F.3d at 648 (“Although past wrongs may help establish the threat of a future injury, they are insufficient alone.”).

¹¹⁶ OGF continues to object to the classification of these six brown bears as “grizzly bears.” See Dkt. 206 at 11-14.

¹¹⁷ There is no evidence of Good Mama or Samantha ever sustaining a cheatgrass-related injury except in 2019, nor is there evidence that these injuries were ESA violations.

¹¹⁸ Morgan Decl., Ex. B (Harrenstien Dep. 58:23-59:13, 62:4-64:20, 72:24-73:3).

Moreover, OGF has never received a citation or even a warning from professionally trained USDA inspectors for cheatgrass in the bear enclosures, its cheatgrass maintenance practices, or its veterinary care for animals who have sustained cheatgrass-related injuries.¹¹⁹ Even when USDA was notified of Good Mama’s cheatgrass encounter and subsequent death, the inspector still issued a clean inspection report that said there were “[n]o non-compliant items identified during this inspection.”¹²⁰

Under these circumstances, there is no plausible basis to allege an ongoing violation. Plaintiff’s expert admitted that she did not observe any cheatgrass at OGF during her visits in 2018 and 2020.¹²¹ Even ALDF’s September 2023 site visit conducted for the sole purpose of finding cheatgrass in bear enclosures did not reveal clear evidence of cheatgrass awns at OGF, and revealed zero evidence of any cheatgrass-related injury.¹²² And no ALDF member has seen the brown bear enclosures since 2015 at the latest.¹²³ As for the bear trailer, it has only been used twice to treat bears in the last 10 years (both times for Samantha) and has not been used for recovery purposes since Samantha’s 2020 non-cheatgrass-related injuries.¹²⁴

Without an ongoing violation, “there is no effective relief that this Court could fashion to redress the plaintiffs’ alleged ESA related injuries, and any such decision by this Court would

¹¹⁹ Beebe Decl. ¶¶ 8-14 & Exs. C-H.

¹²⁰ *Id.* at ¶ 28 & Ex. F.

¹²¹ Morgan Decl., Ex. B (Harrenstien Dep. 58:23-59:13, 62:4-64:20).

¹²² *Id.*, Ex. J (email from lab stating it “do[es] not have expertise in grasses of [the Pacific Northwest]” and that it “suspect[s]” the samples it tested is a species of barley, a genus that includes other plants besides cheatgrass and foxtail).

¹²³ *Id.*, Exs. C (C. McGee Dep. 64:12-16), H (S. McGee Dep. 44:2-23), & D (Long Dep. 59:20-60:6).

¹²⁴ Beebe Decl. ¶¶ 34, 37. Future use of the bear trailer to treat future cheatgrass injuries is also entirely speculative. It would require both a future cheatgrass injury to occur (which is unlikely) and then for the injury to occur under circumstances that prompt a veterinarian to recommend use of the bear trailer for treatment purposes. These are not the kind of certainly pending ESA issues that warrant an injunction.

1 constitute an advisory opinion.”¹²⁵ Accordingly, this Court must dismiss the cheatgrass claim for
 2 lack of subject matter jurisdiction.¹²⁶

3 **C. ALDF’s New Cheatgrass Claims for Violation of the ESA Fails as a Matter of Law.**

4 Jurisdictional flaws aside, ALDF’s cheatgrass claims fail on the merits. ALDF’s burden is
 5 to come forward with admissible evidence showing that an ESA protected grizzly bear is either
 6 being “harass[ed]” or “harm[ed]” by OGF. This ALDF cannot do. ALDF has no evidence that
 7 any of the five brown bears currently living at OGF ever suffered a cheatgrass-related injury, and
 8 cannot form a plausible argument that they are likely to do so in the future. OGF engages in
 9 aggressive and regular cheatgrass control practices, and ALDF has failed to identify a generally
 10 accepted, AWA compliant cheatgrass control practice that OGF is not following. Accordingly,
 11 these ESA claims must fail.

12 **1. ALDF Has No Credible Evidence of Harassment**

13 Under the ESA, harassment is “an intentional or negligent act or omission which creates
 14 the *likelihood of injury* to wildlife by annoying it to such an extent as to significantly disrupt normal
 15 behavioral patterns.”¹²⁷ As this Court previously explained, harassment does not include
 16 “generally accepted” animal husbandry practices that are compliant with the AWA.¹²⁸ ALDF has
 17 the burden to show both (a) that there is such a “generally accepted” standard and (b) that OGF is
 18 violating that standard.

19 Here, OGF’s enclosures for brown bears are, without dispute, compliant with the AWA.
 20 USDA inspector Diane Forbes testified that the brown bear enclosures meet the requirements of

23 ¹²⁵ *Louisiana Crawfish Producers Ass’n-W. v. Mallard Basin, Inc.*, No. CV 6:10-1085, 2016 WL 8459914,
 24 at *6 (W.D. La. Nov. 8, 2016), *report and recommendation adopted as modified*, No. CV 10-1085 (LEAD), 2017 WL
 946712 (W.D. La. Mar. 8, 2017).

25 ¹²⁶ *Breaux v. Haynes*, No. CV 15-769-JJB-RLB, 2017 WL 5158699, at *6 (M.D. La. Aug. 3, 2017), *report*
 and *recommendation adopted*, No. CV 15-769-JJB-RLB, 2017 WL 5202873 (M.D. La. Aug. 21, 2017).

26 ¹²⁷ 50 C.F.R. § 17.3.

¹²⁸ See Dkt. 228 at 17.

1 the AWA.¹²⁹ OGF has never received a USDA citation related to cheatgrass (or any animal safety
 2 issue) for brown bears. This includes a USDA review of necropsy reports for Good Mama,
 3 resulting in the conclusion that there were “[n]o non-compliant items.”¹³⁰

4 Furthermore, there should be no dispute that OGF is engaged in regular and appropriate
 5 cheatgrass control measures. As detailed above, these control measures include weeding, mowing,
 6 plowing, and the limited use of herbicides, resulting in a historically good track record of
 7 cheatgrass control.¹³¹ Dr. Harrenstien even identifies most of these practices as different ways to
 8 control cheatgrass growth.¹³²

9 Critically, ALDF’s Amended Complaint and 60-day notice do not identify any specific
 10 AWA violations associated with the control of cheatgrass (or the use of the bear trailer).¹³³ Nor
 11 do those documents identify any “generally accepted” cheatgrass control measures that OGF
 12 should be using.¹³⁴ The entire purpose of the 60-day notice provision is to identify actions that
 13 can be taken to avoid ESA violations (and the need for unnecessary litigation).¹³⁵ ALDF fails to
 14 demonstrate (or even allege) “that there is a ‘generally accepted’ animal husbandry standard that
 15 was so widely known as to give [OGF] fair notice about what they were required to do in order to
 16 comply.”¹³⁶

17 ALDF, no doubt, will try to turn this into a battle of the experts about cheatgrass control.
 18 But ALDF did not timely designate an affirmative expert for its cheatgrass claims, or produce an
 19 expert report related to cheatgrass or the use of the bear trailer for Samantha. Instead, ALDF

20 ¹²⁹ Morgan Decl., Ex. K (Declaration of Dr. Diane Forbes Dep. 206:25-207:9, 208:25-209:7, 214:18-215:1,
 21 215:8-11).

22 ¹³⁰ Beebe Decl. ¶ 28 & Ex. F.

23 ¹³¹ *Id.* at ¶¶ 8-23.

24 ¹³² Morgan Decl., Ex. B (Harrenstien Dep. 100:5-16, 101:7-16, 105:9-19).

25 ¹³³ *See generally* Dkts. 235-1, 279.

26 ¹³⁴ *Id.*

¹³⁵ *Sw. Ctr. for Biological Diversity v. U.S. Bureau of Reclamation*, 143 F.3d 515, 520 (9th Cir. 1998).

¹³⁶ *Hill*, 423 F. Supp. 3d at 223-24.

1 produced only “rebuttal” reports by Dr. Harrenstien and Dr. Angela Gibson in response to an
 2 opinion by Dr. Briggs. But ALDF, not OGF, bears the burden of showing harassment, and the
 3 existence of a generally accepted practice that was not followed. A rebuttal to Dr. Briggs cannot
 4 satisfy that affirmative obligation.¹³⁷

5 Besides, these rebuttal reports are unhelpful to ALDF. Dr. Gibson discusses AZA
 6 standards, which this Court has already found to be inapposite.¹³⁸ Further, Dr. Gibson’s opinion
 7 is even less credible when she has not seen the brown bears, the brown bear enclosures, or the bear
 8 trailer herself.

9 Dr. Harrenstien’s views are equally unhelpful. She conceded in her deposition that she is
 10 not educated or trained on managing invasive weeds beyond what she does as a “homeowner ...
 11 [in her] own yard.”¹³⁹ Without any authority, training, or experience, she asserts that even a single
 12 grass awn found in an animal enclosure would warrant a citation from a USDA inspector for
 13 violating the AWA.¹⁴⁰ Yet, no USDA inspector has ever issued a citation or warning regarding
 14 cheatgrass in the brown bear enclosures (or any other enclosures) or the veterinary care for
 15 cheatgrass-related injuries.¹⁴¹ Indeed, the lack of USDA citations about the bear enclosure
 16 conditions in the last six years and historically rare instances of animals sustaining cheatgrass-
 17 related injuries reflect how OGF’s cheatgrass maintenance practices meet the overall purpose of
 18
 19
 20
 21

22 ¹³⁷ See *Terpin v. AT&T Mobility, LLC*, No. 18-CV-06975-ODW-KS, 2023 WL 3431906, at *7-9 (C.D. Cal.
 23 Mar. 20, 2023); see also Fed. R. Civ. P. 37(c)(1).

24 ¹³⁸ Dkt. 229 (“Plaintiff has failed to show that the [AZA] standards of excellence, which have been adopted
 25 by a small minority of exhibitors, reflect “generally accepted” animal husbandry practices and have offered no other
 26 standards against which to measure defendants’ conduct.”).

¹³⁹ Morgan Decl., Ex. B (Harrenstien Dep. 39:24-40:12).

¹⁴⁰ *Id.*, Ex. B (Harrenstien Dep. 86:19-88:4).

¹⁴¹ Beebe Decl. ¶¶ 8-14, 23 & Exs. C-H.

1 the AWA to “ensure the humane treatment of animals”¹⁴² and the AWA regulation to keep the
 2 “[p]remises ... clean and in good repair in order to protect the [brown bears] from injury”¹⁴³

3 More importantly, Dr. Harrenstien testified that what is considered generally accepted
 4 practices to control cheatgrass is completely subjective:

5 Q. Is there a generally accepted practice regarding the management,
 6 control, and removal of cheatgrass, foxtail, barley, and other grasses
 with awns from animal enclosures?

7 A. *There must be.* I mean, there -- there are sort of agricultural
 8 recommendations But re-tilling, mechanically removing as
 9 many of those particular grass species as you can just so you don't
 have to do this over and over and replace those grasses with grasses
 that don't make awns because there are plenty of those grass species.

10

11 Q. Are there any other generally accepted practices regarding the
 12 management, control, and removal of cheatgrass, foxtail or barley,
 or grasses with awns, in your opinion?

13 A. I would say -- my opinion is that the herbicide route is not likely
 14 to be effective. But, again, I haven't -- I haven't had to do that. I just
 know that in general, the grasses are more resilient than whatever
 15 toxin you're going to apply to them.

16 Q. So my question was a little bit different --

17 A. So the answer is no.

18 Q. Okay. So there are no other generally accepted practices that
 19 you're aware of regarding the management, control, and removal of
 cheatgrass, foxtail, barley, and other grasses with awns?

20 A. Not other than what I've already described.^[144]

21 This equivocal testimony fails to provide a generally accepted standard that facilities should
 22 follow. And to the extent that it does, OGF has already implemented the control practices that
 23 Dr. Harrenstien identifies, namely the herbicides, mowing, tilling, and removal of cheatgrass.¹⁴⁵

24 ¹⁴² *Just Puppies, Inc. v. Frosh*, 457 F. Supp. 3d 497, 515 (D. Md. 2020).

25 ¹⁴³ 9 C.F.R. § 3.131(c).

26 ¹⁴⁴ Morgan Decl., Ex. B (Harrenstien Dep. 100:5-16, 102:8-24) (emphasis added).

¹⁴⁵ Beebe Decl. ¶¶ 15-22.

1 The court in *Hill* explained the constitutional due process justifications behind plaintiff's
 2 burden to show by the preponderance of the evidence "a clearly articulated, findable, and
 3 understandable exposition of a 'generally accepted' animal husbandry standard."¹⁴⁶ There, zoo
 4 visitors similarly brought an ESA citizen suit against zoo operators for allegedly harming and
 5 harassing grizzly bears based on their bear enclosure conditions.¹⁴⁷ The court rejected the
 6 plaintiffs' reliance on the AZA accreditation standards as a "generally accepted" animal husbandry
 7 practices because such standards were developed by a voluntary zoological organization and
 8 adopted by less than 10 percent of the 2,800 USDA-licensed exhibitors.¹⁴⁸ Plaintiffs' expert
 9 opinions based on those AZA accreditation standards were nothing more than a "subjective
 10 opinion of his 'reasonable expectation' [that] cannot and does not carry the force of law as a federal
 11 regulation."¹⁴⁹

12 Similarly, here, ALDF continues to rely on Dr. Harrenstien's vague opinions and the AZA
 13 accreditation standards to challenge OGF's cheatgrass maintenance practices in its untimely
 14 rebuttal expert opinions. This is because Dr. Harrenstien has admitted that there are no written
 15 generally accepted animal husbandry practices regarding cheatgrass maintenance and that one
 16 must resort to researching the internet, emailing listservs, or asking agricultural extension
 17 agents.¹⁵⁰ She characterizes generally accept animal husbandry practices as "a best practices thing,
 18 a common-sense thing."¹⁵¹ But just as in *Hill*, Dr. Harrenstien's opinion is admittedly not rooted
 19 in "any learned treatise, published literature, scholarly writing or peer-reviewed material in support
 20

21 ¹⁴⁶ 423 F. Supp. 3d at 217, 220-21.

22 ¹⁴⁷ *Id.* at 211.

23 ¹⁴⁸ *Id.* at 222.

24 ¹⁴⁹ 423 F. Supp. 3d at 220; *see also id.* at 219 ("[Plaintiffs] cite[] to a formally adopted set of regulations, but
 then dictates that those regulations are superseded by a higher, more stringent standard that cannot be found in the
 Code of Federal Regulations or anywhere else.").

25 ¹⁵⁰ Morgan Decl., Ex. B (Harrenstien Dep. 105:4-23, 106:14-108:3); *see also id.* (Harrenstien Dep. 93:20-
 26 94:2).

¹⁵¹ *Id.*, Ex. B (Harrenstien Dep. 93:11-19).

1 of [her] conclusion that [OGF's cheatgrass maintenance] animal husbandry practices are not
 2 'generally accepted.'"¹⁵²

3 Because of the extremely broad nature of what is considered generally accepted cheatgrass
 4 control and lack of specific AWA regulations, ALDF cannot meet its burden of proof to show that
 5 OGF has harassed the six brown bears identified in its Amended Complaint by violating the AWA
 6 or generally accepted animal husbandry standards. Any expert opinion it offers is unsubstantiated,
 7 conclusory, and undermined by the totality of the record. ALDF cannot even identify what more
 8 OGF should be doing in terms of its cheatgrass maintenance practices because short of turning the
 9 bear enclosures into a barren, concrete filled cell devoid of *any vegetation*, OGF already has
 10 explored and implemented commonly used cheatgrass control procedures. Accordingly, the
 11 cheatgrass claim should be dismissed.

12 **2. There Is No Evidence That the Six Brown Bears Have Been "Harmed" by**
 13 **OGF's Cheatgrass Maintenance Practices.**

14 ALDF also cannot show that OGF's cheatgrass maintenance procedure and related
 15 veterinary care have subjected any of the six brown bears to "harm" as defined by the ESA. "A
 16 mere potential for future injury is insufficient to establish a 'harm'"¹⁵³ Instead, there must be
 17 evidence that "an actual injury has occurred or is reasonably certain to occur in the imminent
 18 future" that will significantly impair essential behavioral patterns, including breeding, feeding, or
 19 sheltering.¹⁵⁴

20 As stated above, none of the six brown bears identified in the Amended Complaint have
 21 been killed or injured by cheatgrass in their bear enclosures. ALDF's expert admits as much.¹⁵⁵
 22 And OGF's year-round cheatgrass maintenance practices mitigate and minimize the threat that
 23

24 ¹⁵² *Hill*, 423 F. Supp. 3d at 223.

25 ¹⁵³ *Id.* at 224.

26 ¹⁵⁴ *Id.*; see also *Forest Conservation Council v. Rosboro Lumber Co.*, 50 F.3d 781, 784-86 (9th Cir. 1995).

¹⁵⁵ Morgan Decl., Ex. B (Harrenstien Dep. 170:15-24).

1 cheatgrass awns pose to the six brown bears to a degree significantly lower than what bears
 2 naturally encounter in the wild.¹⁵⁶

3 To the extent that ALDF points to Good Mama's and Samantha's 2019 cheatgrass injuries
 4 as evidence of actual injuries, neither bear had ever sustained a cheatgrass-related injury except in
 5 2019, nor is there any evidence of any other brown bear sustaining a cheatgrass-related injury.
 6 These two injuries only show the *mere possibility* for an injury, not the regular and likely
 7 occurrence of an injury. Accordingly, this Court should conclude as a matter of law that there is
 8 no evidence that shows that there is a triable issue left in this case regarding the cheatgrass claim.

9 IV. CONCLUSION

10 For the foregoing reasons, the Court should enter summary judgment dismissing ALDF's
 11 claims for violation of the ESA based on cheatgrass and related veterinary care as a matter of law.

12
 13 *I certify that this memorandum contains 8,342 words in compliance with the Local Civil*
 14 *Rules.*

15 Respectfully submitted,

16 DATED: December 5, 2023.

STOEL RIVES LLP

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25
 26 ¹⁵⁶ See Beebe Decl. ¶¶ 15-24; Morgan Decl., Ex. A (Short Dep. 96:5-10).

CERTIFICATE OF SERVICE

I hereby certify that on December 5, 2023, I caused the foregoing document to be electronically filed with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to all counsel of record.

DATED: December 5, 2023.

s/ Jason T. Morgan
Jason T. Morgan, WSBA 38346